Tan Lee Siang & Ors v Kenneison Brothers Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-12-195 OF 1998
KC VOHRAH J
3 FEBRUARY 1999

Civil Procedure *— Dismissal of action — Plaintiffs and witnesses absent at hearing — Counsels on both sides were present — Whether plaintiffs have locus standi to set aside orders of dismissal — Whether plaintiffs should appealed to the High Court — Subordinate Court Rules 1980 O 28 rr 6, 7 & 9*

The sessions judge dismissed the plaintiffs' cases, apparently under O 28 of the Subordinate Court Rules 1980 ('the rules'), as the plaintiffs and their witnesses were absent at the hearing ('the orders'). Counsels for the plaintiffs and defendant, however, were present. The plaintiffs filed an application to set aside the orders before they were perfected but the sessions judge dismissed the application on the basis that the plaintiffs did not have locus standi since the plaintiffs should have appealed the decision to the High Court. The plaintiffs appealed.

Held, allowing the appeal:

When the rules mention dismissal of an action due to a 'party' being absent, they must mean either the party or counsel being absent. The trial judge may or may not proceed with the trial when a party or his counsel is absent. If he gives judgment for the plaintiff and dismisses the counterclaim of the defendant because the defendant or his counsel is absent, or if he dismisses the action and gives judgment on a counterclaim if the plaintiff or his counsel is absent, the judge would have had no hearing of the case on its merits. Judgment or dismissal is made because either a party or his counsel is absent, and not because there is a hearing on the merits, and there should be allowed an application to the court by the party or whose counsel was absent to set aside any judgment or order made. Therefore, the party has locus standi under O 28 r 8 to apply to set aside the judgment or order of dismissal (see p 720A–C).

[Bahasa Malaysia summary

Hakim mahkamah sesyen telah menolak kes-kes plaintif, nampaknya di bawah A 28 Kaedah-Kaedah Mahkamah Rendah 1980 ('kaedah-kaedah tersebut') kerana plaintif-plaintif dan saksi-saksi mereka tidak hadir semasa perbicaraan ('perintah tersebut'). Namun, peguam-peguam untuk plaintif dan defendan, hadir. Plaintif-plaintif telah memfailkan permohonan untuk mengketepikan perintah tersebut sebelum ia disempurnakan tetapi hakim mahkamah sesyen telah menolak permohonan tersebut atas dasar bahawa plaintif tidak mempunyai locus standi kerana plaintif-plaintif sepatutnya merayu

keputusan tersebut kepada Mahkamah Tinggi. Plaintif-plaintif telah merayu.

Diputuskan, membenarkan rayuan:

Apabila kaedah-kaedah tersebut menyebut penolakan suatu tindakan kerana satu 'pihak' tidak hadir, ia tentu bermaksud bahawa salah satu pihak atau peguam tidak menghadirkan diri. Hakim perbicaraan mungkin atau tidak mungkin memulakan perbicaraan tersebut apabila satu pihak atau peguamnya tidak hadir. Jika beliau memberikan penghakiman kepada plaintif dan menolak tuntutan balas defendan kerana defendan atau peguamnya tidak hadir, atau beliau menolak tindakan tersebut dan memberikan penghakiman untuk suatu tuntutan balas jika plaintif atau peguamnya tidak menghadirkan diri, hakim tersebut sebenarnya tidak mengadakan perbicaraan kes tersebut berdasarkan merit. Penghakiman atau penolakan dibuat kerana salah satu pihak atau peguamnya tidak hadir, dan bukan kerana terdapat perbicaraan berdasarkan merit, dan suatu permohonan kepada mahkamah oleh pihak tersebut atau peguam yang tidak hadir sepatutnya dibenarkan untuk mengketepikan penghakiman atau perintah tersebut. Oleh itu, pihak tersebut mempunyai locus standi di bawah A 28 k 8 untuk memohon mengketepikan penghakiman atau perintah penolakan tersebut (lihat ms 720A–C).]

Notes

For a case on dismissal of action, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 1601.

Cases referred to

Gan Kim Kiat & Brothers Realty Sdn Bhd v Leang Ah Kan [1983] 1 MLJ 351 (refd)

Rachman v Tabrum (1923) 39 LTR 380 (refd)

Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd [1982] 2 MLJ 79 (refd)

Legislation referred to

Subordinate Court Rules 1980 O 28 rr 5, 6, 7, 8

KS Ong (*KS Ong & Co*) for the appellant/plaintiff.
Shelina Razaly (*Kumar Jaspal Quah & Aishah*) for the respondent/defendant.

Cur Adv Vult

KC Vohrah J: Five sessions court civil actions involving the same defendant and ten different plaintiffs were consolidated. On 20 January

1998, the consolidated actions came up for hearing. Counsel for all the plaintiffs was present as was counsel for the defendant. I do not have the notes of proceedings of the case but it appears from the orders made under the separate civil actions that the cases were dismissed ('dibuang') as the plaintiffs and their witnesses were absent. An application was filed by seven plaintiffs to set aside these orders before the orders were perfected but the sessions judge dismissed the application on the basis of a preliminary objection advanced by counsel for the defendant that the plaintiffs did not have locus standi since the plaintiffs should have appealed the decision to the High Court.

It would appear that the sessions judge dismissed the consolidated actions under O 28 r 7(a) of the Subordinate Court Rules 1980.

Order 28 RSC relates to proceedings heard in open court.

Order 28 provides, inter alia, for situations when an action is called on for hearing, ie:

(a) where neither party appears;

(b) where the defendant does not appear; and

(c) where the plaintiff does not appear.

As for the situation where neither party does not appear, r 5 is applicable — the action may be struck out. But the rule itself provides for the restoration of the action.

It reads:

> (1) If, when an action is called on for hearing, neither party appears, the action may be struck out, without prejudice, however, to the restoration thereof, on the direction of the Judge.
>
> (2) An application under this rule must be made within 14 days after the hearing.
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> (3) Where an action is restored, notice of restoration in Form 73 must be given by the Registrar to the parties to the action.

The neutral words 'struck out' are used in r 5 since they cover the situation when both parties do not appear as no judgment or dismissal on a plaintiff's claim or a defendant's counterclaim arises to be decided.

As for the situation where the defendant does not appear, r 6 provides for judgment for the plaintiff's claim and dismissal of the defendant's counterclaim if there is one. Rule 6 does not itself provide for the procedure for the judgment or the order of dismissal of the counterclaim to be set aside.

Rule 6 reads:

> (1) If, when an action, other than actions to which Orders 43, and 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appear, the Court may:
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> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim; and
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> (b) if the defendant has a counterclaim, dismiss the counterclaim with costs; and
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> make any other order as it thinks just.

A Rule 7 provides for the situation where the plaintiff does not appear when the action is called. It allows for the court to dismiss the action if the defendant has no counterclaim and if he has, to give judgment for the defendant. Rule 7 itself does not provide for the procedure for the judgment on the counterclaim or order of dismissal of the plaintiff's action to be set aside.

B Rule 7 reads:

> If, when an action is called on for hearing the defendant appears but the plaintiff does not appear the Court may:
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> (a) if the defendant has no counterclaim, dismiss the action with costs;
>
> C (b) if the defendant has a counterclaim, give judgment for the defendant on his counterclaim; and
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> make any other order as it thinks fit.

As stated earlier, neither r 6 itself nor r 7 itself provides for the procedure for setting aside the judgment or order obtained under the rule. As a D drafting device, r 8 takes care of the procedure where the judgment or order given in the absence of a party (whether the plaintiff or defendant) may be set aside. It reads as follows:

> (1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.
>
> E (2) An application under this rule shall be subject to Order 29 rule 14.

It will be noted that neither rr 6, 7 or 8 envisages a situation where the judgment or order was given after a trial; no evidence was adduced and the judgment or order was given because of the absence of the plaintiff or F defendant when the action was called for hearing. Both rr 6 and 7 are obviously intended to cope with the situation where the trial cannot go on as one of the parties is absent. A plaintiff's counsel cannot effectively proceed with the trial if the plaintiff whose evidence is essential for the case is absent. Likewise, the defendant's counsel cannot effectively proceed with the trial if the defendant is absent and his evidence is essential.

G I must place on record that I am aware of the case *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 but it is not exactly on point. Of interest is, however, the case of *Gan Kim Kiat & Brothers Realty Sdn Bhd v Leang Ah Kan* [1983] 1 MLJ 351 at p 352E–G where Peh Swee Chin J (as he then was) had this to say:

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> The second point I wish to stress is that in a civil case, unlike a criminal case, a litigant can always be represented by his solicitor who is a duly authorized agent for a plaintiff or a defendant. Such being the case, that when a civil case, it follows, comes up for hearing as fixed, the solicitor can be present without his client. If the solicitor is present, and his client is absent, then no court can give judgment (eg for a liquidated demand) in default of appearance, when the I solicitor's client is defendant or dismiss the claim with costs when the solicitor's client is plaintiff. If the court orders the case to proceed to trial, when a solicitor is present but without his client, then it merely means, in practical terms, that the said solicitor is deprived of a possibly most important material witness. ...

It seems to me that when the rules mention 'party' being absent, they must mean for practical purposes as the context requires, either the party or counsel being absent. The trial judge may or may not proceed with the trial when a party or his counsel is absent depending on whether evidence can be adduced that day in respect of the party concerned and for other relevant reasons. If he gives judgment for the plaintiff and dismisses the counterclaim of the defendant because the defendant or his counsel is absent or if he dismisses the action and gives judgment on a counterclaim if the plaintiff or his counsel is absent, the judge would have had no hearing of the case on its merits. Judgment or dismissal is made because either a party or his counsel is absent and not because there is a hearing on the merits, and there should be allowed an application to the court by the party or whose counsel was absent to set aside any judgment or order made under O 28 r 7 of the SCR. The party has locus standi under O 28 r 8 to apply to set aside the judgment or order of dismissal.

As was remarked by Lord Chief Justice Hewart in *Rachman v Tabrum* (1923) 39 LTR 380 at p 381:

> The principle is where a summon to case has not been heard, but merely struck out, the court may if it thinks fit, hear or entertain the summon or case, but if there has been a hearing on the merits, though in the absence of one party, it cannot do so after the order is perfected.

I therefore allow the appeal. The sessions judge is to hear the application filed by the appellants in his court to set aside the order of dismissal of the plaintiffs' actions.

Appeal allowed.

Reported by Loo Lai Mee